



CITY HALL
33325 8th Avenue South • PO Box 9718
Federal Way, WA 98063-9718
(253) 835-7000
www.cityoffederalway.com

August 17, 2005

Western Washington Municipal SW Comment
Bill Moore
WA Department of Ecology
Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Subject: Comments on the preliminary NPDES Phase II draft permit language

Dear Mr. Moore:

On August 19th, 2005, the Department of Ecology will close the window for comments on the preliminary draft NPDES Phase II permit. It is our understanding that Ecology will review all the comments received and address them in some fashion with the next formal draft permit due out later this year. It is also our understanding that the Department of Ecology intends to issue a final permit by March of 2006. The City of Federal Way commends Ecology staff on their drive to finally issue the Phase II permit, however we are concerned that there are still major issues yet to be resolved and no process in place to address them.

As you are aware, Federal Way has been working with other Phase II agencies to review the draft language. We have also been working with representatives from the Association of Washington Cities and Washington State Association of Counties on behalf of the much smaller agencies without resources available to dedicate to this effort. On or about July 19th, a letter was sent to Mr. Jay Manning, Director of Ecology, expressing concerns on some major issues with the permit in its current form. Federal Way shares these concerns and believes they warrant repeating here in a more global format. Further detailed comments on the draft permit language are attached and follow the format requested by Ecology for reviewers of the permit.

Major issues of concern:

Monitoring: The draft permit requires Phase II jurisdictions develop comprehensive stormwater monitoring plans, and do so in a way that demonstrates the Ecology manual, BMP's, and approaches to stormwater discharges will result in improvements to water quality and overall environment. Further, development of plans is to be done in conjunction with other jurisdictions. While this sounds reasonable on the surface, our concerns, is that this essentially means the City of Federal Way will have to turn over our

program to one of the four Phase I jurisdictions we border: King County, City of Tacoma, Pierce County, or WSDOT, or we simply provide them the funding.

It is inappropriate to expect smaller Phase II programs to be able to bear the financial burden of a full Phase I monitoring program. We do not expect to see a Phase I jurisdiction running a smaller monitoring program than their permit requires.

The cost implications of this are large, and the expectation of what is to be achieved is simply beyond what we consider reasonable. Based on the amount and type of monitoring already conducted by the Phase I jurisdictions, adequate information exists to tell us that there are contaminants in stormwater in varying degrees based on: different watershed characteristics, land uses, road types, landscaping preferences of citizens, specials of the month by local garden supply centers/mega box stores, and additives to fuels approved by the federal government. Local jurisdictions, much less local stormwater programs have little control over these factors, therefore additional monitoring would not give us any new information. As such, we would support the concept of developing monitoring ideas that result in changes to our program that make a difference, such as improved maintenance to remove pollutants or improved illicit detection and removal processes.

As to answering the questions posed in S.6, Monitoring in the draft permit, we believe there are simply too many variables and factors that affect environmental conditions – involving non-point sources and other things beyond our control -- for us to quantitatively measure how stormwater programs and BMP's are improving water quality.

In addition, we strongly disagree with the principle that since local jurisdictions are requiring developments to utilize water quantity and quality BMP's we are therefore responsible for testing them for BMP effectiveness. Many, if not all the BMP's required, come directly out of Ecology's Technical Manual. Those BMP's that are not in the manual were established through the TAP-E protocols and TRC committee review and approval process. While we agree that these tools need to be continually supported and advanced, it is our opinion that this responsibility falls to DOE and the TRC Committee and that Ecology needs to continue to staff and support the TRC with qualified individuals. If testing is to be done on BMP's in Ecology's manual, it is our opinion that it should be done by, or under contract to, the Department of Ecology.

Attached to this letter is a counter proposal for S.6, Monitoring which we would like to discuss with you and your staff.

Pre-development, forested conditions – and legal 'takings' concerns: The language in the permit as drafted requires that stormwater flows for new development and redevelopment be mitigated to meet a standard of pre-developed, forested conditions. We believe that in urban and urbanizing environments, this standard is unattainable and raises

serious legal concerns. Specifically, we have consulted with our City Attorney who strongly believes that mitigation requirements outlined in the draft permit would leave us very vulnerable to “takings” claims.

Specifically, the cases cited are the *Nollan vs. California Coastal Commission* and *Dolan v. City of Tigard* cases, as well as a March 1995 memorandum from the State Attorney General’s Office that reads in part, “...a permit condition which imposes substantial costs or limitations on property uses could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated.”

While we understand Ecology’s desire to restore as much of the natural drainage system through flow modification and water quality improvements, the proposed permit language would place each jurisdiction in jeopardy of legal challenges that, in our opinion, cannot be won; therefore we cannot support the permit language the way it is currently written.

“New discharge” definition: Language in the permit seems to imply that *any* change to an existing outfall – even replacing a culvert to comply with Washington Department of Fish and Wildlife guidelines – is to be defined as a “new discharge.” This follows from page 8, lines 5-11, page 37, line 42, and page 38, lines 1-12. This would place major burdens on our jurisdictions. We would like to discuss language modifications to clarify that replacement of failing or inadequate outfalls does not qualify as a ‘new’ stormwater discharge.

“Use of Ecology Manual as law, not guidance”: The permit requires application of the new DOE Manual or equivalent, which is contrary to the previous determination by Ecology that the Manual is a guidance document only. The permit sets up a dynamic that makes it difficult if not impossible for an applicant to apply any other manual to a development site without extensive and expensive justifications. Further, the manual would require changes to plans currently in the review process, which appears contrary to state vesting laws. We cannot apply the permit requirements retroactively to applications deemed complete prior to adoption of the permit and an approved manual. Failure on our part to do so however places us in violation of our permit as it is currently written. This is an untenable position that we cannot support.

Deadlines that are unattainable: The Phase II permit as drafted contains a wide array of adoption deadlines and inspection frequencies, many of them within one year. These will be difficult to achieve with existing staff resources. Further, some of the reporting requirements do not appear to have a reasonable justification. As an example, annual reporting of expenditures appears to be a subjective measurement that does not improve the environment or stormwater programs. It will take significant resources to compile the

data for submittal with the annual report and will not show how well a program is protecting the environment. Further discussion on this issue occurs in the detailed review comments attached.

Testing and reporting requirements: As relayed above, we believe that if Ecology wants all existing BMP's subjected to testing, the Department should bear the cost and responsibility for that testing, not Phase II permittees. We would like to explore other options for frequency and content of reporting requirements.

Assumptions regarding adoption of the DOE stormwater manual: The Phase II draft makes the tacit assumption that jurisdictions should adopt the DOE stormwater manual as Best Available Science (BAS). The manual – which was intended to be used for guidance only and not as a requirement – contains a number of conditions that are of serious concern to jurisdictions. For example, it classifies replacement and maintenance actions of already-impervious surfaces, including roads, as redevelopment. In addition, there is concern that the option to adopt an equivalent manual that recognizes municipality-specific conditions is not provided in Phase II as it is in Phase I due to limited Ecology staff to review any alternatives submitted.

Fiscal, liability, and staffing concerns: We are concerned that Phase II jurisdictions will be paying new permit fees, and yet Ecology will not have staffing in place to properly review the Phase II programs that will be submitted. This leaves us wondering what we are paying for, and whether the permit will provide Phase II jurisdictions any coverage from third party lawsuits. If standards are too high, and administrative review and protection is haphazard, *our* liability exposure is actually *increased*, rather than *reduced*, as was anticipated by the permit.

Overall, the Draft Phase II permit appears to go well beyond the six mandatory minimum EPA guidelines “+ 2” agreement that local jurisdictions and DOE agreed to through the advisory committee process in late 2003. It also goes beyond what has been adopted in many other states which do not require any water quality monitoring element (other than evaluation of program compliance) for Phase II jurisdictions. As a result, we are very concerned about costs, unfunded mandates, practicability, and legal ‘takings’ issues.

We believe that Federal Way has an excellent program devoted to protecting and enhancing the environment within our jurisdictional boundaries. We participate at local and regional levels for watershed planning efforts. We work with outside groups such as Friends of the Hylebos Wetlands to bring together the community and volunteers to help restore our wetlands and streams and we work cooperatively with other agencies on cross boundary issues relative to stormwater, ESA issues, and the environment.

Through these efforts we have realized that it is not a mandated requirement that drives the people involved, rather a real desire to make a difference in their community. We are concerned that the draft permit language would draw precious resources away from

efforts already underway that are showing results in the environment and instead, replace these efforts with more "process" and report writing that will not help to improve our city's natural environment.

We encourage Ecology to review these more comprehensive issues when writing the next draft of the permit and involve more communities in resolving them prior to the next release. Further, we encourage you to not be driven by an arbitrary date to the detriment of resolving these issues. This would likely result in further delays as the issues are then decided through the court systems as challenges are brought by different parties.

Thank you for the opportunity to comment on the preliminary draft NPDES Phase II permit. We look forward to working with you and other Ecology staff on the next draft.

Sincerely,

A handwritten signature in cursive script that reads "Paul A. Bucich". The signature is written in dark ink and is positioned above the printed name and title.

Paul A. Bucich, P.E.
Surface Water Manager

Enc. (2)

Cc: David H. Moseley, City Manager
City Council
Cary M. Roe, P.E., Public Works Director
File: NPDES Phase II Permit Comments